IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4137 OF 2006

Smt. Neeta Tikam Nariani ..Applicant
Vs.
The State of Maharashtra and anr. ..Respondents

Mr. A.H.H. Ponda for applicant.
Mr. D.P. Adsule, APP for State.
Mr. Kishore Bhatia for respondent no.2.

CORAM: B.H. MARLAPALLE, J.

Date : August 10, 2007.

P.C.:

1. Heard Mr. Ponda the learned counsel for the applicant who is impleaded as an accused in C.C. No.924/S/2002 and originally registered as C.C. No.212/S/2001. In the said complaint, which has been filed through the Power of Attorney holder of the complainant, an application came to be filed by the accused on 28/8/2006 praying for dismissal of the complaint under Section 256 of Cr.P.C. on the ground that the complainant was repeatedly absent and has never remained present in the criminal case, and that the case was kept pending only to harass the accused-lady and to trouble her on account of the

repeated absence of the complainant. It was also contended that in view of the law laid down by this court in the case of Dr. Pradeep Mohanbay vs. Mr. Minguel Carlos Dias [2000 (2) ALL MR 664] and Mamatadevi Prafullakumar Bhansali vs. Pushpadevi Kailashkumar Agrawal [2005(2) Mh.L.J. 1003] that the complainant never appeared before the court, he did not step in the witness box and the General Power of Attorney did not know the accused and, therefore, the complaint was required to be dismissed.

2. It is also pertinent to note that this application was filed when the evidence of PW 1 was recorded and the statement of the accused under Section 313 of Cr.P.C. was also recorded. The learned Magistrate was pleased to reject the said application on 18/9/2006. He referred to the reliance placed by the applicant on the above stated two decisions of this court and held that the application was filed only to delay the matter and it was not tenable at that stage.

3. The accused, therefore, approached the Sessions Court in Criminal Revision Application No.

1080 of 2006 and the same came to be dismissed by the learned Additional Sessions Judge on 14/11/2006. The Sessions Court again referred to the above stated two decisions of this court and noted that the trial was in progress and at the end of the trial the Magistrate can draw conclusions about the reliability and acceptability of the evidence of the Power of Attorney holder in the light of the said judgments and the application under Section 256 of Cr.P.C. could not be argued by mixing the acceptability and reliability of the evidence of the complainant's witness with the aspect of his non appearance. The Sessions Court referred to the scheme of Section 256 of Cr.P.C. and did not find any illegality to interfere with the view taken by the learned Magistrate. Mr. Ponda the learned counsel for the applicant-accused again referred to the above stated two decisions of this court and the certified copy of the roznama of the trial court in C.C. No.924/S/2002 and submitted that it was a fit case where the complaint was required to be dismissed under Section 256 of Cr.P.C. He also referred to the points of law raised by the applicant before the Sessions Court and submitted that they are required to be adjudicated upon by this court.

4. There is no dispute that a complaint under Section 138 of the Negotiable Instruments Act, 1881 can be filed and set in motion by the General Power of Attorney on behalf of the complainant. There is no bar for such power of attorney holder to appear as a witness in the complaint and whether such a power of attorney holder would substitute the complainant or not is a matter which depends on the facts of each case. The application moved by the accused was dismissed by invoking powers under Section 256 of Cr.P.C. and not on the ground that the complainant never remained present or that he never entered the witness box. Proviso to subsection 1 of Section 256 of Cr.P.C. states that when the complainant is represented by a pleader the Magistrate may dispense with his attendance and proceed with the case. In the impugned order dated 18/9/2006 the learned Magistrate observed that on the day the application was filed, the power of attorney holder of the complainant and the complainant's advocate were present before the court and if that be so, there was no case made out by the accused to invoke the powers under Section 256 of Cr.P.C. and dismiss the complaint. The learned Addl.

Sessions Judge is right in his observations that the aspect of the reliability of the evidence of the complainant could not be mixed with the issue of absence of the complainant all along so as to invoke the powers under Section 256 of Cr.P.C. Thus, the concurrent view taken by both the courts below cannot be termed as erroneous, leave alone grossly erroneous and it is a possible view which does not call for interference at the hands of this court under Article 227 of the Constitution or for that matter under Section 482 of Cr.P.C. The issues raised by the applicant before the Sessions Court would be considered in an appropriate case.

5. The application is hereby rejected.

(B.H. Marlapalle,J.)